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No. 90-814

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ASHLEY ELLIOTT,

v.

Petitioner,

MERCURY MARINE, a Division of Brunswick Corporation,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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**Petition for a Writ of Certiorari to the
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REPLY TO BRIEF IN OPPOSITION

This case presents simple, yet extraordinary, circumstances. The Court of Appeals overturned a jury verdict in favor of Elliott on the basis of the court's view on unsettled issues of Alabama state law. In reaching its decision, the court accorded no deference to the District Court's ruling and did not employ the appropriate method of analysis in discerning state law. The Supreme Court of Alabama is about to resolve the identical issues of Alabama law pursuant to questions drafted and certified by the same District Court Judge who presided in this case, and the highest state court is extremely likely to disagree with the Eleventh Circuit's pronouncements.

This Court need only direct the Eleventh Circuit to reconsider this case in light of the state court's definitive statement on the outcome-determinative issues of state law, in order to vindicate well-settled concepts of fundamental fairness and the principles of comity and cooperative judicial federalism. None of respondent's arguments supports denial of certiorari.

ARGUMENT

1. Respondent's principal argument is that granting certiorari would force this Court to "hold the case on its docket for the indefinite future." Brief for the Respondent in Opposition at 8, 15, 20 (hereafter "Opp."). Apparently, respondent did not read the Petition for Certiorari. Elliott specifically requested that the Court "grant certiorari, vacate, and direct the Eleventh Circuit to reconsider its determination of [the] state law issues once the Alabama Supreme Court has ruled." Petition for a Writ of Certiorari at 3 (hereafter "Pet."). As petitioner noted, nothing more is required of this Court: "the Eleventh Circuit can itself correct its decision once it is provided the necessary guidance by the Supreme Court of Alabama." *Id.* at 22.

Even if this Court decides, alternatively, to hold the Petition for consideration after the Supreme Court of Alabama has ruled, there would be nothing remarkable about that decision. This Court routinely holds petitions for certiorari pending resolution of another case when, as here, the interests of justice counsel such action. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 5.9 (6th ed. 1986) (noting that a petition for certiorari may be held, without the Court's taking any action, "until an imminent state court decision is rendered on a controlling issue of state law").

There is nothing "indefinite" about the future of the certified questions the Supreme Court of Alabama has agreed to address in *Beech v. Outboard Marine Corp.*,

No. 89-1815. The Supreme Court will be poised to answer those questions within the week.¹

Granting certiorari would not create undesirable precedent. Respondent suggests that it would support this Court's holding the petition of a party seeking review of an adverse decision in one court of appeals pending the decision of the same issue in another court of appeals. See Opp. 16 n.7. But, of course, one court of appeals is not required to follow the decision of another court of appeals; consequently, there would be no justification for awaiting the later decision. This case is critically different. The Eleventh Circuit *must* follow the decisions of the Supreme Court of Alabama on issues of substantive Alabama law. See, e.g., *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). And the Supreme Court of Alabama, in a case containing "no legitimate, factual or legal distinction," will resolve "the identical issues of Alabama law" that control this case. *Beech v. Outboard Marine Corp.*, Civil Action No. 89-AT-0789-M, Memorandum Opinion at 3-4 (N.D. Ala., Sept. 19, 1990); Pet. App. 17a-18a (hereafter "Mem. Op."). Respondent cannot avoid the inevitable conclusion that Elliott will be the only litigant subjected to the Eleventh Circuit's erroneous prediction and misconstruction of Alabama law if the state court ruling on state law is different from the Eleventh Circuit's prediction. In this narrow context, fundamental fairness and principles of comity and cooperative judicial federalism call for this Court to vacate the Court of Appeals' decision.

2. Respondent's assertion that Elliott has not articulated an error of federal law is baffling. Petitioner demonstrates at length that the Eleventh Circuit failed to employ the appropriate method of analysis under

¹ Defendant Outboard Marine Corporation's brief must be filed by January 11, 1991. See *Beech v. Outboard Marine Corp.*, No. 89-1815, Order (Dec. 13, 1990); 2a.

this Court's *Erie* decision in attempting to ascertain Alabama law. Pet. 15-18.

Perhaps because it realizes that the Eleventh Circuit's analysis is indefensible and that the court's speculation on Alabama law is incorrect, respondent grossly mischaracterizes petitioner's argument and then knocks down the strawman it has erected. Thus, respondent unjustifiably charges Elliott with arguing that "the Eleventh Circuit ignored Alabama authorities and rendered its decision solely on the basis of rulings from other jurisdictions." Opp. 9 n.3. This charge is plainly false. As petitioner frankly discusses (Pet. 17 n.21), the Eleventh Circuit intoned Alabama precedents in beginning its analysis. But as the District Court explained in *Beech v. Outboard Motor Corp.*, the case on which the court, and respondent, rely—*General Motors Corp. v. Edwards*, 482 So.2d 1176 (Ala. 1985)—is not controlling. Mem. Op.; Pet. App. 16a. In *General Motors*, the state court did not rule upon the legal issues presented here.

Respondent stubbornly resists recognition that the Court of Appeals cited no Alabama authority supporting its two narrow, outcome-determinative rulings on Alabama state law: that an unguarded boat propeller is not dangerous beyond the reasonable expectations of an ordinary consumer, *see* 903 F.2d at 1507; Pet. App. 6a; and that the lack of a propeller guard on the market at the time this motor was manufactured precluded a finding that a safer alternative design was available, *see* 903 F.2d at 1509-1510; Pet. App. 8a-11a. Respondent makes no attempt to defend the court's unexplained and inexplicable reliance on precedents from other jurisdictions on these two issues of law. *See* Pet. 17-18. Respondent may approve of the federal court's decision as to what it thought Alabama law should be, but that cannot substitute for proper consideration of what Alabama law is. The Supreme Court of Alabama will definitively articulate Alabama law regarding these two specific issues in respond-

ing to certified questions 2 and 3 in *Beech*. See Pet. App. 24a. And the state court is most likely to disagree with the Eleventh Circuit's views.²

Had this litigation proceeded in the Alabama courts, Elliott's lawsuit would have been resolved under the correct and controlling statement of Alabama law, which the Supreme Court of Alabama will articulate imminently; instead, petitioner was subjected to the Eleventh Circuit's faulty analysis and almost certainly incorrect prediction. This discrimination, which occurred only because of the "fortuitous circumstances of residence out of [the] State of one of the parties to the litigation," *Guaranty Trust Co. v. York*, 326 U.S. 99, 112 (1945), should not be sanctioned by this Court.

3. Respondent seeks to avoid the patent injustice evident here by denying that the questions certified in *Beech* are "identical" to the outcome-determinative issues of Alabama law decided by the Eleventh Circuit below. See Opp. 17-19.³ Respondent's denial is unavailing. The District Court Judge who considered numerous motions in this case, presided over the trial on the merits, and upheld the jury's verdict, and who has presided over the *Beech* case for over one and one-half years, ruled

² Respondent spends most of its energy defending the Eleventh Circuit's decision. But it fails to explain why the Supreme Court of Alabama accepted the certified questions if it thought the Eleventh Circuit had ruled correctly. In any event, respondent is wrong. Respondent, for example, makes no attempt to reconcile the court of appeals' decision with the Alabama precedent demonstrating that the "open and obvious" complete defense is not recognized in Alabama. See Pet. 19. Compare *Lovell v. Marion Power Shovel Co.*, 909 F.2d 1088 (7th Cir. 1990) (discerning that Indiana law recognizes no such defense).

³ Strangely, respondent recites at length the *Beech* plaintiff's *unsuccessful* arguments regarding the alleged factual differences between the two cases. Opp. 18-19 & n.8. In deciding to certify questions, the District Court flatly rejected these arguments, explicitly holding that there is "no legitimate, factual . . . distinction between [the two cases]." Mem. Op. at 4; Pet. App. 18a.

that there is no legitimate distinction, either factual or legal, between the two cases. *Beech*, Mem. Op. at 3-4; Pet. App. 17a-18a. That same judge drafted the certified questions of Alabama law that the Supreme Court of Alabama will soon resolve. The judge carefully explained that the questions were based on the factual and legal issues presented in *Elliott*. See *id.*⁴ Thus, the certified questions in *Beech*, if answered favorably to Elliott, will mandate a different outcome here.

4. As discussed in the Petition for Certiorari and above, petitioner has demonstrated ample reason for granting certiorari in this case, but there is more. This case presents the precise issue this Court will resolve in *Salve Regina College v. Russell*, No. 89-1629—the proper standard of review regarding a district court’s resolution of state law issues in a diversity case.⁵

In *Salve Regina College*, the court of appeals deferred to the district court’s ruling on state law issues of first impression. See *Russell v. Salve Regina College*, 890 F.2d 484 (1st Cir. 1989). In this regard, the court followed the traditional, accepted practice, which recognizes that the district court judge has greater familiarity with the law of the State in which he or she sits. See, e.g., *United States v. Hohri*, 482 U.S. 64, 74 n.6 (1987). Petitioner in *Salve Regina College* argues that every party is entitled to *de novo* appellate review of a district court de-

⁴ Thus, respondent is simply wrong in asserting that the certified questions in *Beech* do not present the same issues decided in this case. Contrary to respondent’s contention, questions 1, 2, 4 and 5 do *not* assume the existence of a feasible propeller guard. Opp. 19. That is the very issue those questions seek to resolve.

⁵ This Court’s grant of certiorari in *Salve Regina College* refutes respondent’s suggestion that cases controlled by state law do not warrant this Court’s attention. Like *Salve Regina College*, this case “involv[es] fundamental questions of fairness and the allocation of power between the federal and state judiciaries.” *Salve Regina College v. Russell*, No. 89-1629, Petitioner’s Brief on the Merits at 13. See Pet. 3, 12.

cision on issues of state law.⁶ See *In re McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc) (rejecting the rule of deference and replacing it with an "independent de novo standard" of review).

As in *In re McLinn*, the Eleventh Circuit utilized a *de novo* standard in reviewing the outcome-determinative issues of state law in this case; the court accorded *no* deference whatsoever to the District Court's decision despite the fact that the state law questions arise under the law of the District Court's home jurisdiction.⁷ Elliott notes in her Petition that, in this regard, the Court of Appeals departed from generally accepted practice among the federal courts of appeals. Pet. 15 n.19. If this Court holds in *Salve Regina College* that a district court's ruling on state law issues (at least regarding the law of the State in which the district judge sits) is entitled to *any* level of deference, the Eleventh Circuit's decision should be vacated and remanded for reconsideration under the proper standard of review. Thus, at the very least, this case should be held pending this Court's decision in *Salve Regina College*.

⁶ Petitioner has requested this Court either to reverse and remand for an independent *de novo* review of the controlling issues of state law, or to reverse and certify those issues to the state supreme court for resolution.

⁷ Furthermore, the court of appeals' opinion was written by a senior judge from the Federal Circuit sitting in the Eleventh Circuit by designation. See 903 F.2d at 1505 n.**; Pet. App. 1a. See also *United States v. Hohri*, 482 U.S. at 74 n.6 (noting that the "problem" of "Federal Circuit judges . . . not be[ing] familiar with questions of state tort law . . . is mitigated considerably by the fact that those cases are tried before local federal district judges, who are likely to be familiar with the applicable state law, [and] a district judge's determination of a state-law question usually is reviewed with great deference").

CONCLUSION

For all the foregoing reasons, as well as the reasons set forth in the Petition for Certiorari, this Court should grant the Petition for Certiorari, vacate the Eleventh Circuit's decision below and direct the court to reconsider its decision once the Supreme Court of Alabama has answered the state law questions certified in *Beech v. Outboard Marine Corp.*, No. 89-1815. Alternatively, the Court should (1) defer consideration of the Petition for Certiorari pending the Supreme Court of Alabama's decision in *Beech*, and, if the Supreme Court of Alabama rules differently than the Eleventh Circuit, thereafter grant the Petition, vacate the Eleventh Circuit's decision, and remand for reconsideration, or (2) hold the Petition pending this Court's decision in *Salve Regina College v. Russell*, No. 89-1629.

Respectfully submitted,

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JANUARY 1991

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APPENDICES



APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7686

IN RE: OUTBOARD MARINE CORPORATION,
Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING

(Nov. 28, 1990)

BEFORE: FAY, COX and BIRCH, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Outboard Marine Corporation is denied.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
United States Circuit Judge

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

December 13, 1990

89-1815

Ex parte Matthew Beech, a minor, who sues through his father and next friend, Thomas L. Beech v. Outboard Marine Corporation

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION
(89-AR-0789-M)

ORDER

The United States Court of Appeals for the Eleventh Circuit denied the petition for rehearing on the petition for writ of mandamus filed by the defendant, Outboard Marine Corporation, it is, therefore, ordered that the stay entered by this Court on October 23, 1990, is lifted. The brief of the defendant, Outboard Marine Corporation, is due to be filed in this Court within 21 days from the date of this order.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewithin set out as same appear(s) of record in said Court.

Witness-my-hand this 13th day of Dec., 1990.

/s/ Robert G. Esdale
Clerk
Supreme Court of Alabama

